

# Hitting the Right Person

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Maximilian Steinbeis Sa 26 Mai 2018

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Dear Friends of Verfassungsblog,

If you ever want to violate the constitution and get away with it, you should pick a nuclear company as your victim. They are ugly, they are loaded, they are anonymous, they enjoy almost zero public sympathy. It is not even intuitively plausible that they should have basic rights at all. Whatever hits them never hits the wrong person, right?

The thing about violating the constitution, however, is of course that it's not just some person that gets hit. In these times of conflict with Poland, with Hungary, with Russia, with Turkey and with all those governments that subordinate their constitutional ties to their political power interests, I would, to be honest, be rather keen that my own German government should not, for its part, be on record that it cares about the constitution and the Constitutional Court's rulings only as long as it hits the right person. Which is why today I find myself in the odd position of defending the cause of a nuclear company.

Why is that? In 2016, after the German government decided to phase out nuclear energy in the wake of the Fukushima melt-down, the Federal Constitutional Court issued a ruling partly in favour of the plant operators who were forced to write off billions without proper compensation in a way that, according to the Karlsruhe Court, infringes their right to property. With a multi-billion compensation suit by the Swedish state-owned energy giant Vattenfall before a Washington ICSID court looming, the German government this week passed a draft bill to implement the provisions of the Federal Constitutional Court – allegedly, that is. In fact, if I interpret the draft correctly (more details here), it basically reinstates pretty much the very same property right infringement that Karlsruhe had explicitly stated as unconstitutional all over again.

Suck it up, is what the German legislator, the German taxpayers' interest in mind, has to say to the Swedish taxpayers behind Vattenfall. A very similar message is addressed to the Karlsruhe Court. Vattenfall is free to bring a new complaint and sue Germany all over again, of course, but until the Court will issue another verdict, many years will pass and the current government coalition will long be history, so the perspective to be once again found on the wrong side of the law appears to be a risk the legislator is prepared to take.

Can the Court defend itself? Cases of stalling and slipped deadlines to correct unconstitutional laws have indeed happened before, and that sort of legislative slight is usually not taken lightly in Karlsruhe. At times, the Court has even threatened to take the matter into its own hands if the legislator failed to comply in a persistent manner. Thank goodness it has never come that. The legal basis for that announcement actually provides just for a way for the Court to regulate the "manner of execution" of its decision. Whether or not one could construct on that basis also something for this particular constellation, too? I

dare not say. In any case, this is treacherous terrain. A court, constitutional or otherwise, acts when it is called upon and not of its own accord. If it errs from that path it may compromise its authority just as much as if it allows the legislator to have its way with it.

## Evil must not win

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The Federal Constitutional Court is facing grief for other reasons, too, in these days. The far-right AfD party has presented its constitutional case against the alleged "lawlessness" since the alleged "opening of the border" in 2015 this week, which I had mentioned in my last editorial. Their legal counselor is a fellow named Ulrich Vosgerau, a habilitated lecturer in constitutional law from the University of Cologne with a reputation of not shying away from taking unorthodox views about things like sovereignty of the people (which he understands in a markedly ethnic sense). The way he justifies the admissibility of the case is somewhat unorthodox, too, given the fact that this sort of action can be filed only within 6 months after the allegedly unconstitutional event occurred.

Whether he and his AfD clients truly believe their case to be admissible is something we will never know, but it's also beside the point, it seems to me, when I read Vosgerau's recently appeared self-published booklet "The Rule of Lawlessness" ("*Die Herrschaft des Unrechts*"). On page 45, for example, one learns that the author had been "asked by various citizens" to lodge a constitutional complaint on their behalf against the refugee policy of the German government, but unfortunately had to tell them that the chances of success were "less than 5%" (the man is a good lawyer, no doubt about that). In a footnote he adds a personal observation. Even a completely hopeless constitutional complaint, he writes, could have a symbolic function that should not be underestimated:

"In my youth I was an enthusiastic supporter and promoter of Greenpeace. I remember how *Greenpeace Deutschland e.V.* once filed a constitutional complaint in the 1980s on behalf of the seals in the North Sea. This was legally absurd – neither are seals entitled to fundamental rights, nor did Greenpeace e.V. have power of attorney to act in their name – but in reality it was not a legal dispute, but a political action with the purpose of triggering appropriate reporting, thematization and publicity in the media (...). The foreseeable rejection of the constitutional complaint was not actually experienced by Greenpeace's supporters as a defeat but, conversely, as confirmation of their own view that the existing political and social system has serious shortcomings that would stand in the way of effective environmental protection. Quod erat demonstrandum."

The double bind the AfD and its litigator seek to involve the Court is easy to distinguish. From that perspective, it is not necessarily a bad thing at all if the action is found inadmissible. Conversely, it cannot even be inadmissible enough: the blunter and curter the rejection by the Court, the gaudier the exposure of the "serious shortcomings" of the "existing political and social system". The Court Justices will be exposed as boneless Merkel minions, and the AfD will be sure to convey to its followers that it is incumbent on the true-blooded German sovereign people and its AfD representatives to replace them by proper loyal *Rechtswahrer* in the most expeditious manner. The institution that shields

individual and minority rights from the "will of the people" will be marked as just another political opponent that needs to be defeated and subjugated. Pretty much along the lines of what we have seen in Poland.

Quod erat demonstrandum, indeed.

## It takes one to Mambo

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**Israel** is the latest example of a state whose highest court sees its competence to remind the "will of the people" of its constitutional duties contested. [ALON HAREL](#) explains the current discussion about the *Knesset's* right to override the Supreme Courts constitutional rulings and its background.

Placing a heavy political thumb on the constitutional court has been common practice in **Hungary** for some time, but now, according to [ZOLTÁN FLECK](#), the government is increasingly targeting the ordinary judiciary, too.

Worrying news also comes from **Greece**, where the anarchist *Rubicon* group is attacking public institutions and the rule of law and reminds [IOANNIS GLINAVOS](#) of fascism.

In **India**, the opposition Congress Party is currently running a campaign against the ruling Hindu nationalists under the slogan "Save the Constitution!". [ADEEL HUSSAIN](#) reports.

In **Catalonia**, the separatist government under its new head Quim Torra is performing a kind of ethnocentrism mambo, much to the horror of PAU MARÍ-KLOSE.

The European Court of Justice will probably soon decide whether the **Polish** constitutional state is still sufficiently trustworthy to enforce its arrest warrants Europe-wide. [MARCIN MATCZAK](#) describes the current practice of the rule of law in Poland to the Luxembourg judges in an *Amicus Curiae* brief, so that they do not delude themselves. [TOMASZ KONCEWICZ](#) is disappointed at how the Polish government is defying the Court in the case of logging the pristine forests of Białowieża and getting away with it. [MATEJ AVBELJ](#) argues that there is no such thing as a new Central and Eastern European constitutionalism.

The European Convention on Human Rights is taking action against its member state **Azerbaijan's** attempts to corrupt the Parliamentary Assembly and to disregard the Strasbourg Court's rulings. [MICHAELA HAILBRONNER](#) comments.

In **Bavaria**, despite many protests, the regional CSU governing majority has presented the reluctant police with a wealth of highly problematic new powers, including DNA phenotyping. [CARSTEN MOMSEN](#) and [THILO WEICHERT](#) show why this is bad.

**German** public broadcasting and its funding was the subject of a much discussed hearing before the Federal Constitutional Court last week, the proceeds of which are analysed by [WOLFGANG SCHULZ](#) (German).

[SEBASTIAN BRETTHAUER](#) relates how the **German** Supreme Court BGH stroke a balance between civil procedure law and data protection in its ruling on traffic "dashcams" in cars (German).

In another important BGH case on the question of whether **German** banks are allowed to address their female customers in a generically masculine form, the court's reasons to answer in the affirmative have been published and are analyzed by CAROLIN MÜLLER-SPITZER from a linguistic perspective (German).

In the **European** Parliament, the attempt to facilitate transnational lists in the next elections has come to a piteous end, thanks to the opposition of the European People's Party and much to the regret of FABIO WOLKENSTEIN.

## Elsewhere

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JELENA VON ACHENBACH is sceptical as to whether the European Court of Justice ruling *De Capitani* on the trialogue procedure is really such a triumph for making European legislation more democratic (German).

QUIRIN WEINZIERL suspects that the recent *BVerfG* ruling on stadium bans may have a massive and unforeseen impact on community standards on social platforms (German).

HÉLÈNE LAMBERT applauds the ECtHR for its recent *Hoti v. Croatia* judgment on the right of stateless persons.

JOSEPH FISHKIN is surprised at the way Viktor Orbán and Mike Pence each use the term "Rule of Law".

KAMEL AJJI is reminded of Jack Balkin's concept of "information fiduciary" on the occasion of Facebook boss Mark Zuckerberg's appearance before the EU Parliament (French).

CÉLINE ROYNIER recommends the British practice of taking responsibility as a minister by resigning from office to France (French).

FRANCIS YOUNG wonders whether the British government could overcome the Brexit scepticism in the House of Lords by packing it with a few hundred freshly ennobled Brexiteers.

The IACL/AICD blog is currently running an interesting series of articles on the current crisis at the Indian Supreme Court.

Boy, that has become one hunk of an editorial. But as I played truant last week, I mustn't complain. If you've read all the way to here, you must be either exceptionally stubborn or really enjoying this. Which is a great pleasure to me! I am very proud about the fantastic reach this editorial has by now in the constitutionalist community in Europe and beyond, and about the great feedback I keep getting from so many of you. That keeps me going!

All the best,

Max Steinbeis

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